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No. 09-1211

In the Supreme Court of the United States

MAYRA ISABEL JEREZ-SANCHEZ, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether an alien who was convicted of an aggravated felony after a trial and was then placed in a deportation proceeding before April 1997, must make an individualized showing of having relied on the possibility of a discretionary waiver of deportation in order to establish eligibility for such a waiver under former 8 U.S.C. 1182(c) (repealed 1996).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is unreported. The orders of the Board of Immigration Appeals (Pet. App. 3a-7a, 50a-53a) and the Immigration Judge (Pet. App. 54a-57a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 7, 2010. The petition for a writ of certiorari was filed on April 6, 2010. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Former Section 212(c) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(c) (1994) (repealed 1996), authorized some permanent resident aliens domiciled in the United States for seven consecutive years to

apply for discretionary relief from exclusion. While, by its terms, Section 212(c) applied only to exclusion proceedings, it was generally construed as being applicable in both deportation and exclusion proceedings. See *INS* v. *St. Cyr*, 533 U.S. 289, 295 (2001).

Between 1990 and 1996, Congress enacted three statutes that "reduced the size of the class of aliens eligible for" relief under Section 212(c). *St. Cyr*, 533 U.S. at 297. In the Immigration Act of 1990, Pub. L. No. 101-649, § 511, 104 Stat. 5052, which was enacted on November 29, 1990, Congress made Section 212(c) relief unavailable to anyone who had been convicted of an aggravated felony and served a term of imprisonment of at least five years. In April 1996, in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 440(d), 110 Stat. 1277, Congress further amended Section 212(c) to make ineligible for discretionary relief aliens previously convicted of certain criminal offenses, including aggravated felonies, irrespective of the length of the sentence served. See *St. Cyr*, 533 U.S. at 297 n.7. In September 1996, in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 304(b), 110 Stat. 3009-597, Congress repealed Section 212(c) in its entirety, and replaced it with Section 240A of the INA, 8 U.S.C. 1229b. The latter section now provides for a form of discretionary relief known as cancellation of removal that is not available to many criminal aliens, including those who have been convicted of an aggravated felony (which, as relevant here, includes a drug-trafficking crime). See 8 U.S.C. 1101(a)(43)(B), 1229b(a)(3); see also *St. Cyr*, 533 U.S. at 297.

In *St. Cyr*, this Court held, based on principles of non retroactivity, that IIRIRA's repeal of Section 212(c)

should not be construed to apply to an alien convicted of an aggravated felony through a plea agreement at a time when the sentence the alien received under the plea agreement would not have rendered him ineligible for relief under former Section 212(c), but a greater sentence, of five years or more, would have done so. 533 U.S. at 314-326. In particular, the Court explained that, before 1996, aliens who decided "to forgo their right to a trial" by pleading guilty to an aggravated felony "almost certainly relied" on the chance that, notwithstanding their convictions, they would still have some "likelihood of receiving [Section] 212(c) relief" from deportation. *Id.* at 325.

On September 28, 2004, after notice-and-comment rulemaking proceedings, the Department of Justice promulgated regulations to take account of the decision in *St. Cyr*. See *Section 212(c) Relief for Aliens with Certain Criminal Convictions Before April 1, 1997*, 69 Fed. Reg. 57,826 (2004). In its response to comments received on the proposed rule, the Department noted cases holding that "an alien who is convicted after trial is not eligible for [S]ection 212(c) relief under *St. Cyr*," and then stated that it "has determined to retain the distinction between ineligible aliens who were convicted after criminal trials[] and those convicted through plea agreements." *Id.* at 57,828. That determination is reflected in the regulations, which make aliens ineligible to apply for relief under former Section 212(c) "with respect to convictions entered after trial." 8 C.F.R. 1212.3(h).

The regulations also authorized an alien who was already subject to an administratively final order of deportation or removal to file a "[s]pecial motion to seek [S]ection 212(c) relief" that was exempt from the usual limits on the timing and number of motions to reopen or

reconsider. 8 C.F.R. 1003.44. The regulations required such a special motion to be filed by April 26, 2005. 8 C.F.R. 1003.44(h). In addition to incorporating the eligibility requirements contained in 8 C.F.R. 1212.3, the section authorizing special motions to reopen independently provided that it was "not applicable with respect to any conviction entered after trial." 8 C.F.R. 1003.44(a).

2. Petitioner is a native and citizen of the Dominican Republic who was admitted to the United States as an immigrant in 1976. Pet. App. 6a; Administrative Record (A.R.) 201. In September 1994, she was convicted by a jury of "Distribution of a Schedule II controlled substance (cocaine)" in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2, and was sentenced to a term of 70 months in prison, although she ultimately served less than five years of that sentence. Pet. App. 19a, 52a; A.R. 140-141, 201.

In September 1996, the INS commenced deportation proceedings against petitioner, charging her with being deportable as an alien convicted of a controlled-substance offense and as an alien convicted of an aggravated felony (drug trafficking). Pet. App. 51a; A.R. 201-206; see 8 U.S.C. 1251(a)(2)(A)(iii) and (B)(i) (1994). The immigration judge (IJ) found petitioner to be deportable as charged, and because he determined that she was not eligible for any relief from deportation after AEDPA, ordered her deported to the Dominican Republic. Pet. App. 54a-57a.

Petitioner appealed to the Board of Immigration Appeals (Board), which, in March 1999, dismissed her appeal, finding that she was statutorily ineligible for relief under Section 212(c) in light of her aggravated felony conviction. Pet. App. 50a-53a. Petitioner filed a petition for judicial review, which was transferred by the Second

Circuit to district court, and later dismissed. See 99-4046 Docket entry (2d Cir. Aug. 10, 1999); 00-cv-982 Docket entry (D. Conn. Jan. 31, 2002).

3. In April 2009—more than ten years after the Board had rejected petitioner's appeal from her order of deportation—petitioner filed with the Board a special motion to Seek 212(c) relief, pursuant to 8 C.F.R. 1003.44. Pet. App. 8a-22a. Petitioner acknowledged that her motion was untimely under the regulation, but argued that the April 26, 2005 deadline for such special motions was "arbitrary" and "place[d] a new retroactive effect to AEDPA in clear violation of the holding of *St. Cyr*." *Id.* at 16a-19a. She claimed that, notwithstanding her conviction after a trial, she was eligible for relief under former Section 212(c) because, she said, *St. Cyr* "held that 212(c) should be available to aliens who were convicted prior to the enactment of AEDPA and IIRIRA." *Id.* at 19a-20a.

In May 2009, the Board denied petitioner's special motion, stating that, on the merits, she was ineligible for relief under Section 212(c) because she "was convicted after a trial, not by a plea of guilty." Pet. App. 6a-7a. The Board also held that petitioner's motion was untimely, because it was filed almost four years after the April 26, 2005 deadline and petitioner had not "argued or established" any "facts warranting an exception to th[e] timeliness requirement." *Id.* at 7a.

4. Petitioner sought judicial review in the Second Circuit, and the government moved for summary affirmance on the ground that petitioner's special motion for Section 212(c) relief had been untimely. Gov't C.A.

Mot. 7-8.[1] The court of appeals construed the government's motion as one requesting summary denial of petitioner's petition for review and granted it, holding that "[b]ecause petitioner is not eligible for relief under § 212(c) of the Immigration and Nationality Act due to her conviction for an aggravated felony after a jury trial, the [Board] did not abuse its discretion in denying her special motion made pursuant to 8 C.F.R. § 1003.44." Pet. App. 1a-2a. The court did not expressly address the Board's alternate holding (also urged in the government's motion for summary affirmance) that petitioner's special motion to reopen was untimely. See *ibid.*

ARGUMENT

The unpublished order of the court of appeals does not warrant review. Although the court of appeals stated that petitioner is ineligible for relief under former Section 212(c) in light of her conviction after trial for an aggravated felony, it did not explain its reasoning. See Pet. App. 2a. Nor did the government address that issue in its motion for summary affirmance in the court of appeals. See p. 5 & n.1, *supra*. And the court of appeals' unpublished order does not establish binding precedent in the Second Circuit.

The question petitioner seeks to raise involves the retroactive effect of a statutory repeal that occurred 14 years ago, and this Court has repeatedly denied petitions urging a similar extension of its decision in *INS* v. *St. Cyr*, 533 U.S. 289 (2001). See, *e.g.*, *De Johnson* v.

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[1] In a footnote, the government stated that the untimeliness of petitioner's special motion "render[ed] moot the Board's additional holding that [petitioner], in any event, was not even eligible for 212(c) relief since she was convicted after a trial, rather than after a plea agreement." Gov't C.A. Mot. 8 n.1.

Holder, 130 S. Ct. 3273 (2010); *Molina-De La Villa* v. *Holder*, 130 S. Ct. 1882 (2010); *Ferguson* v. *Holder*, 130 S. Ct. 1735 (2010); *Cruz-Garcia* v. *Holder*, 129 S. Ct. 2424 (2009); *Aguilar* v. *Mukasey*, 128 S. Ct. 2961 (2008); *Zamora* v. *Mukasey*, 553 U.S. 1004 (2008); *Hernandez-Castillo* v. *Gonzales*, 549 U.S. 810 (2006); *Thom* v. *Gonzales*, 546 U.S. 828 (2005); *Stephens* v. *Ashcroft*, 543 U.S. 1124 (2005); *Reyes* v. *McElroy*, 543 U.S. 1057 (2005); *Lawrence* v. *Ashcroft*, 540 U.S. 910 (2003); *Armendariz-Montoya* v. *Sonchik*, 539 U.S. 902 (2003). Moreover, petitioner's claim is independently barred by the Board's determination that her special motion for Section 212(c) relief was untimely by nearly four years.

1. Petitioner contends that the decision below conflicts with this Court's retroactivity analysis, either because reliance interests need not be taken into account in deciding whether the repeal of Section 212(c) applies to aliens in her position (Pet. 26-28), or because an alien deciding to go to trial would have done so "in reasonable reliance on the continuing availability of Section 212(c) relief" (Pet. 28-29). Those objections lack merit.

a. As this Court has explained, in determining whether a statute has a retroactive effect, a court must make a "commonsense, functional judgment" that "should be informed and guided by 'familiar considerations of fair notice, *reasonable reliance*, and settled expectations.'" *Martin* v. *Hadix*, 527 U.S. 343, 357-358 (1999) (emphasis added) (quoting *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 270 (1994)).

In *St. Cyr* itself, this Court placed considerable emphasis on the fact that "[p]lea agreements involve a *quid pro quo*," whereby, "[i]n exchange for some perceived benefit, defendants waive several of their constitutional rights (including the right to a trial) and grant the gov-

ernment numerous tangible benefits." 533 U.S. at 321-322 (citation and internal quotation marks omitted). In light of "the frequency with which [Section] 212(c) relief was granted in the years leading up to AEDPA and IIRIRA," the Court concluded that "preserving the possibility of such relief would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial." *Id.* at 323. And because the Court concluded that aliens in St. Cyr's position "almost certainly relied upon th[e] likelihood [of receiving Section 212(c) relief] in deciding whether to forgo their right to a trial," the Court held that "the elimination of any possibility of [Section] 212(c) relief by IIRIRA has an obvious and severe retroactive effect." *Id.* at 325. Thus, the likelihood of reliance played an important role in the Court's decision in *St. Cyr*. Petitioner's contrary view— that the prospect of reliance is irrelevant—would make the Court's analysis of guilty pleas in *St. Cyr* superfluous.

In asserting that the court of appeals misinterpreted *St. Cyr*, petitioner relies principally (Pet. 27) on two of this Court's retroactivity cases: *Landgraf* and *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939 (1997). Those cases do not support petitioner's arguments. In *Landgraf*, the Court specifically identified "reasonable reliance" as a consideration that "offer[s] sound guidance" in evaluating retroactivity, 511 U.S. at 270, and it quoted that same proposition from *Landgraf* in *St. Cyr*, 533 U.S. at 321, which was decided well after *Hughes Aircraft*. Petitioner also argues (Pet. 30-31) that the court of appeals' reasoning conflicts with the canon of statutory interpretation, described in *Clark* v. *Martinez*, 543 U.S. 371, 378 (2005), that a single statutory term cannot be construed to have different mean-

ings based on the factual circumstances of the applicant. That canon is inapplicable to the relevant aspect of this Court's retroactivity analysis. *Clark* interpreted a statutory term. See 543 U.S. at 378. The second step of retroactivity analysis, on the other hand, determines the temporal reach of a statute only when it has been established that the statute contains no provision establishing its retroactivity. See *St. Cyr*, 533 U.S. at 316-317. Where the application of a statute would have retroactive effect, retroactivity analysis may require a court to decline to apply the statute. *Id.* at 316. Conversely, in a case where the same statute would not have retroactive effect, there is no reason not to apply the statute. See *Landgraf*, 511 U.S. at 269-270. Whether a statute's application would have a retroactive effect necessarily depends on "transactions" and "considerations already past" that are associated with a particular case. *Ibid.* (quotation marks omitted). Nothing in *St. Cyr* suggested that any alien who was eligible for Section 212(c) relief before its repeal would remain forever eligible. To the contrary, the Court held that Section "212(c) relief remains available for aliens, *like respondent, whose convictions were obtained through plea agreements* and who, notwithstanding those convictions, would have been eligible for § 212(c) relief at the time of their plea under the law then in effect." 533 U.S. at 326 (emphasis added). That understanding is likewise embodied in the regulations promulgated by the Department of Justice following *St. Cyr*, concerning the availability of relief under Section 212(c) in proceedings before an IJ or the Board. See pp. 3-4, *supra*. One regulation, promulgated in the exercise of the Attorney General's discretion in implementing the INA, provides a special-motion procedure to seek relief under former Section 212(c) for aliens

who had received a final order of removal or deportation and could otherwise no longer file a motion to reopen their proceedings. 8 C.F.R. 1003.44. That regulation separately provides that it is unavailable "with respect to any conviction entered after trial." 8 C.F.R. 1003.44(a).

Moreover, this Court's most recent decision addressing retroactivity in the immigration context explicitly discussed *St. Cyr* and reconfirmed the importance of reliance. In *Fernandez-Vargas* v. *Gonzales*, 548 U.S. 30 (2006), the Court stated that *St. Cyr* "emphasized that plea agreements involve a *quid pro quo* * * * in which a waiver of constitutional rights * * * had been exchanged for a perceived benefit * * * valued in light of the possible discretionary relief, a focus of expectation and reliance." *Id.* at 43-44 (citations and internal quotation marks omitted). Distinguishing the situation of the alien in *Fernandez-Vargas* from that of the alien in *St. Cyr*, the Court remarked that, "before IIRIRA's effective date Fernandez-Vargas never availed himself of [provisions providing for discretionary relief] or took action that enhanced their significance to him in particular, as St. Cyr did in making his *quid pro quo* agreement." *Id.* at 44 n.10.

Thus, the court of appeals did not err to the extent that its unexplained decision may have relied on the absence of a prospect of reliance as part of its "commonsense, functional judgment" about retroactivity. *Martin*, 527 U.S. at 357.

b. Petitioner argues in the alternative (Pet. 28-29) that all aliens who went to trial before IIRIRA should be deemed, as a categorical matter, to have objectively reasonably relied on the availability of Section 212(c) relief.

That conclusion, however, does not follow from the case law and is contrary to common sense.

As the Seventh Circuit recently explained, even though *St. Cyr* recognized that "it is more than likely that those aliens faced with plea agreements contemplated their ability to seek [S]ection 212(c) relief, the same logic cannot necessarily be extended to those aliens convicted at trial" because they did not, as a categorical matter, "forgo any possible benefit in reliance on [S]ection 212(c)." *Canto* v. *Holder*, 593 F.3d 638, 644-645 (2010), petition for cert. pending, No. 09-1333 (filed Apr. 28, 2010). And no court has interpreted this Court's retroactivity analysis to find a retroactive effect based on new consequences flowing from *every* prior decision or action. To the contrary, several courts have specifically held that the prior decision to commit a crime is not the sort of decision that is protected against application of subsequent limitations on the scope of Section 212(c), whether the alien asserted possible reliance on not getting caught, or acquittal at trial, or a sentence that would not bar relief, or the continued availability of relief at all. See *Ponnapula* v. *Ashcroft*, 373 F.3d 480, 495-496 & n.14 (3d Cir. 2004); *Rankine* v. *Reno*, 319 F.3d 93, 101-102 (2d Cir.), cert. denied, 540 U.S. 910 (2003); *Armendariz-Montoya* v. *Sonchik*, 291 F.3d 1116, 1121 (9th Cir. 2002), cert. denied, 539 U.S. 902 (2003); *Jurado-Gutierrez* v. *Greene*, 190 F.3d 1135, 1150-1151 (10th Cir. 1999), cert. denied, 529 U.S. 1041 (2000); *LaGuerre* v. *Reno*, 164 F.3d 1035, 1041 (7th Cir. 1998), cert. denied, 528 U.S. 1153 (2000). Indeed, in the decision that this Court affirmed in *St. Cyr*, the Second Circuit explained that "[i]t would border on the absurd to argue" that aliens "might have decided not to commit" crimes "or might have resisted conviction more vigor-

ously, had they known that if they were not only imprisoned but also * * * ordered deported, they could not ask for a discretionary waiver of deportation." *St. Cyr* v. *INS*, 229 F.3d 406, 418 (2000) (quoting *Jurado-Gutierrez*, 190 F.3d at 1150; in turn quoting *LaGuerre*, 164 F.3d at 1041), aff'd, 533 U.S. 289 (2001). Yet, that is the sort of result to which petitioner's alternative interpretation of retroactive effect would lead.

Petitioner's circumstances are distinct from those of aliens whom the courts have found to be eligible for since-repealed relief by virtue of reliance that took some form other than a guilty plea. The alien in the Ninth Circuit's decision in *Hernandez de Anderson* v. *Gonzales*, 497 F.3d 927 (2007), took the affirmative step of bringing "herself—and her criminal convictions—to the INS's attention by applying for naturalization," and, in doing so, had relied upon the potential availability of suspension of deportation by waiting to apply for naturalization until she had accrued the ten years of continuous residence that made her eligible for such relief. *Id.* at 936-937, 941-943. The alien in the Tenth Circuit's decision in *Hem* v. *Maurer*, 458 F.3d 1185 (2006), was held to have made an objectively reasonable decision to forgo a right to an appeal that would have put him "at risk of being sentenced to a sentence longer than 5 years * * * making him ineligible for § 212(c) relief." *Id.* at 1199.

Petitioner, by contrast, identifies no affirmative act that she performed in possible reliance on the availability of Section 212(c) before its repeal. She cannot advance any claim that she actually relied at any time during her criminal case on the possibility of Section 212(c) relief, because she has admitted that she was "completely unaware" at the time of her trial (and any subsequent decision whether to appeal) that a conviction

would render her deportable, much less that she would have been ineligible for relief from deportation under Section 212(c) if she then served a prison sentence of more than five years. Pet. App. 20a. Moreover, as an objective matter, it would not have made sense for petitioner to decide to go to trial and thus *increase* her risk of receiving a lengthier sentence than she would under a guilty plea, when she would become altogether ineligible for Section 212(c) relief once she served five years of a prison term imposed after trial. Indeed, after trial, petitioner did receive a 70-month sentence, which, between 1990 and 1996, would have been disqualifying had she served all of it. See p. 2, *supra*.[2]

2. Petitioner contends (Pet. 9-15) that there is a significant conflict among the circuits about the availability of Section 212(c) relief to aliens who went to trial and were convicted of crimes before the enactment of IIRIRA. As an initial matter, her case does not turn on the actual questions presented in her petition. But, in any event, the disagreement that petitioner identifies in the analysis of the circuits is narrow.

a. Petitioner's questions presented, her description of the disagreement in the circuits, and her argument on the merits are all directed at the retroactive application of the repeal of Section 212(c) by Section 304(b) of IIRIRA. Pet. i, 8-9, 22, 26. But that is not the provision that rendered petitioner ineligible for relief under Section 212(c). Petitioner's deportation proceedings began

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[2] Moreover, having received a 70-month sentence, petitioner would presumably have had an incentive, like the alien in *Hernandez de Anderson*, *supra*, to bring herself and her conviction to the attention of the government in order to ensure that deportation proceedings could be concluded before she served sufficient time in prison (60 months) to disqualify her from relief under Section 212(c).

in September 1996, seven months before IIRIRA's repeal of Section 212(c) became effective. See pp. 2, 4, *supra*. Thus, both the Board and the IJ found petitioner ineligible for relief under Section 212(c) because Section 440(d) of AEDPA made Section 212(c) relief unavailable to those with aggravated-felony convictions. Pet. App. 52a, 57a. When the Board denied her special motion to reopen, it again cited Section 440(d) of AEDPA —not IIRIRA's subsequent repeal. *Id.* at 6a.

b. Even assuming that the answer to the questions petitioner presents about IIRIRA would also apply to the AEDPA provision that actually barred her from Section 212(c) relief, the divergences of analysis in the courts of appeals are, as a practical matter, narrow. Nine circuits have declined to extend the holding of *St. Cyr* as a general matter to aliens who were convicted after going to trial rather than pleading guilty. See *Dias* v. *INS*, 311 F.3d 456, 458 (1st Cir. 2002), cert. denied, 539 U.S. 926 (2003); *Rankine*, 319 F.3d at 102 (2d Cir.); *Mbea* v. *Gonzales*, 482 F.3d 276, 281-282 (4th Cir. 2007); *Hernandez-Castillo* v. *Moore*, 436 F.3d 516, 520 (5th Cir.), cert. denied, 549 U.S. 810 (2006); *Kellermann* v. *Holder*, 592 F.3d 700, 705-707 (6th Cir. 2010); *United States* v. *De Horta Garcia*, 519 F.3d 658, 661 (7th Cir.), cert. denied, 129 S. Ct. 489 (2008)[3]; *Armendariz-Montoya*, 291 F.3d at 1121 (9th Cir.); *Hem*, 458 F.3d at 1189 (10th Cir.); *Ferguson* v. *United States Att'y Gen.*, 563 F.3d 1254, 1259-1271 (11th Cir. 2009), cert. denied, 130 S. Ct. 1735 (2010). Two circuits have held that no show-

[3] Petitioner states that the Seventh Circuit has "created a limited exception to its otherwise categorical rule," but the exception identified by petitioner would still require an alien to establish "'reliance on the possibility of § 212(c) relief.'" Pet. 15 (quoting *De Horta Garcia*, 519 F.3d at 661).

ing concerning reliance is required and that new legal consequences attached by IIRIRA to an alien's conviction were sufficient to prevent the Board from precluding Section 212(c) relief. See *Atkinson* v. *Attorney Gen.*, 479 F.3d 222, 231 (3d Cir. 2007); *Lovan* v. *Holder*, 574 F.3d 990, 994 (8th Cir. 2009).[4]

Petitioner suggests (Pet. 9-11) that she would be eligible for relief under former Section 212(c) in the Third and Eighth Circuits. But that is by no means clear.

In *Atkinson*, the alien was placed in a removal proceeding in June 1997; the Third Circuit thus evaluated the retrospective effect of IIRIRA, which, as discussed above, is not applicable here. Moreover, the *Atkinson* court's analysis was based on the observation that this Court "has never held that reliance on the prior law is an element required to make the determination that a statute may be applied retroactively." 479 F.3d at 227-228. But that result cannot be squared with the rationale of *St. Cyr*, which specifically identified "reasonable reliance" as an important part of the "commonsense, functional judgment" in retroactivity analysis, and then explicitly rested its holding on the assessment that it was likely that aliens who pleaded guilty prior to 1996 had reasonably relied on the possible availability of Sec-

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[4] Petitioner cites (Pet. 11) the Fourth Circuit's decision in *Olatunji* v. *Ashcroft*, 387 F.3d 383 (2004), as rejecting any reliance requirement for retroactivity analysis. But *Olatunji* involved the retroactive application of a change in the definition of the term "admission," and itself distinguished the Fourth Circuit's prior decision in *Chambers* v. *Reno*, 307 F.3d 284 (2002), which involved Section 212(c). See *Olatunji*, 387 F.3d at 392 (discussing *Chambers*, 307 F.3d at 293). And petitioner acknowledges (Pet. 11 n.2) that, after *Olatunji*, the Fourth Circuit held that "IIRIRA's repeal of [Section] 212(c) did not produce an impermissibly retroactive effect as applied to an alien convicted after trial." *Mbea*, 482 F.3d at 281.

tion 212(c) relief. See 533 U.S. at 321-323. If the Third Circuit's view that retroactivity analysis turns on the fact of conviction simpliciter were correct, then that entire discussion in *St. Cyr* was superfluous.

Petitioner's invocation (Pet. 11) of the Eighth Circuit's decision in *Lovan*, *supra*, is even less relevant. The judgment in *Lovan* turned on facts not present here, and does not show that petitioner would have prevailed in the Eighth Circuit.[5] But, to the extent that *Lovan* follows *Atkinson*, the deviation in the circuits' analysis remains narrow, because the Third Circuit nonetheless acknowledged that reliance is "but one consideration." *Atkinson*, 479 F.3d at 231. As a result, the

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[5] Unlike petitioner, Lovan was convicted after trial in 1991 of an offense (sexual abuse of a minor) that was not an aggravated felony before enactment of IIRIRA, and was placed in a removal proceeding, not a deportation proceeding. Although the court stated that the fact that Lovan was convicted after trial did not "preclude[] relief under *St. Cyr*," 574 F.3d at 994, that was extraneous to the court's reasoning and judgment. The court determined that the designation of Lovan's crime as an aggravated felony rendered him ineligible for Section 212(c) relief. See *id.* at 996 (observing that Lovan "would be ineligible for relief under former § 212(c) * * * after his 1991 conviction for sexual abuse of a minor because of the statutory counterpart doctrine"). Lovan's main argument that he was entitled to relief was based on the fact that he had left the country and been re-admitted in 2002, although he could have been found inadmissible on his application for admission for a conviction of a crime involving moral turpitude. *Id.* at 994. And, if he had been found inadmissible on that basis, then he would have been eligible to apply for Section 212(c) relief (assuming that a conviction following a trial was not a bar). Lovan argued that the Board should have treated him *nunc pro tunc* as if he had departed and sought re-admission before his crime was designated an aggravated felony. *Id.* at 995-996. The decision in *Lovan* focused on that situation-specific argument, and the court remanded for the Board to reconsider it. Here, by contrast, petitioner was placed in deportation proceedings during her incarceration. Therefore, the result in this case does not conflict with *Lovan*.

difference from the other circuits' analysis extends only to whether a determination of retroactive effect *must* turn on the prospect of reliance. No circuit has denied that a determination of retroactive effect *may* be based on the prospect of reliance. Thus, as the Seventh Circuit recently noted, "the distinction between [its] analysis" and "that of the Third, Eighth, and Tenth Circuits * * * is one of fine line drawing." *Canto*, 593 F.3d at 644.

c. Finally, to the extent petitioner contends that the court of appeals "made its decision in conscious rejection of the law previously adopted" by the Second Circuit (Pet. 15), it is not generally this Court's role to resolve an intra-circuit conflict. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). And that is, of course, all the more true when the decision in question is unpublished and does not explain the court's reasoning.

3. Petitioner contends (Pet. 6) that she presents "an important and recurring question of federal law." In fact, the issue is of quite limited prospective importance because it pertains to the retroactive effect of a statutory amendment to former Section 212(c) that occurred fourteen years ago (upon the enactment of AEDPA) and was superseded less than one year later by another statutory amendment (upon the effective date of IIRIRA).

Petitioner notes the existence of a number of judicial decisions addressing the retroactive availability of Section 212(c) relief. Pet. 15-19 & n.4. But, as the government explained in its brief opposing certiorari (at 15-17) in *Ferguson* v. *Holder*, cert. denied, 130 S. Ct. 1735 (2010) (No. 09-263), those decisions are not a reliable indication of the issue's continuing importance, because the great majority of them involved immigration pro-

ceedings (like this one) that were initiated before *St. Cyr*. As a general matter, the number of grants of relief under former Section 212(c) has declined dramatically in recent years: by 55% (from 1905 grants to 858 grants) between FY 2004 and FY 2009. See Exec. Office for Immigration Review, U.S. Dep't of Justice, *FY 2008 Statistical Year Book*, Table 15, at R3 (2009), http://www.justice.gov/eoir/statspub/fy08syb.pdf; Exec. Office for Immigration Review, U.S. Dep't of Justice, *FY 2009 Statistical Year Book*, Table 15, at R3 (2010), http://www.justice.gov/eoir/statspub/fy09syb.pdf. Over that same period, the number of applications for relief under former Section 212(c) fell at an even greater rate. In FY 2004, there were 2617 applications; in FY 2698, there were 1281; and in FY 2009, there were 576. That reflects a 78% decline since FY 2004—and a 55% decline just since FY 2008. In addition, because most criminal defendants plead guilty (see Pet. 17 n.3; *Padilla* v. *Kentucky*, 130 S. Ct. 1473, 1485 (2010)), the number of aliens affected by the general rule in the circuits that Section 212(c) does not apply to an alien who was convicted after a trial, therefore, would be only a small fraction of those numbers.[6] Finally, because green cards issued after 1989 expire after ten years, see 54 Fed. Reg. 47,586 (1989), nearly all lawful permanent residents who are removable on the basis of pre-IIRIRA convictions (even

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[6] Cf. *Pennaputa*, 373 F.3d at 496 n.16 ("[I]n comparison to the holding in *St. Cyr*, the effect of our overall holding is likely to be small. First, the class of aliens affected by this ruling is constantly shrinking in size as the effective date of IIRIRA recedes into the past. Second, * * * many aliens who are within the scope of this holding will nonetheless be statutorily ineligible for [Section] 212(c) relief by reason of having served five years or more in prison. Third, many times more criminal defendants enter into plea agreements than go to trial.").

those who did not leave and re-enter the United States) have already been exposed to immigration authorities at some point since 2000. That shrinks even further the pool of those who might still have new proceedings initiated against them on the basis of pre-1996 convictions.

Thus, there is still every reason to believe that this is an issue of diminishing prospective importance—and one that is already of considerably less current importance than the one on which the government sought review in *St. Cyr* ten years ago. See Pet. 16.

4. Petitioner contends (Pet. 22-26) that this case is a better vehicle for resolving questions about the retroactive application of Section 304(b) of IIRIRA than several others in which this Court has recently denied certiorari. Even setting aside the fact, discussed above, that her case turns on the retroactive effect of AEDPA rather than IIRIRA, this case would be a particularly poor vehicle, because petitioner is incorrect in claiming that, apart from the question about whether *St. Cyr* should be extended to aliens convicted after trial, "there is no dispute that petitioner would otherwise qualify for relief" under former Section 212(c). Pet. 24.

Quite the contrary, petitioner's application for relief is independently barred—as the Board held—by the untimeliness of her special motion. See Pet. App. 7a ("[T]his motion would have been due by April 26, 2005. The motion was not filed until April 15, 2009, and therefore is untimely. No facts warranting an exception to this timeliness requirement have been argued or established.") (citations omitted). Petitioner suggests (Pet. 8) that the deadline for special motions (which was 180 days after the effective date of the regulation) is "arbitrary," "unfair and unconstitutional." The court of appeals did not address the validity of the deadline for spe-

cial motions, which makes it an inappropriate issue for this Court to consider in its capacity as a "court of review, not of first view." *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005). There is, however, no basis for petitioner's objections. Nothing required the issuance of regulations to provide for reopening of removal orders that had long ago become final. *A fortiori*, nothing barred the government from imposing a 180 day filing deadline on that special form of discretionary reopening relief. See also *Johnson* v. *Gonzales*, 478 F.3d 795, 798-800 (7th Cir. 2007) (upholding the 180 day deadline in 8 C.F.R. 1003.44(h) against a challenge that it had an "impermissible retroactive effect").

Accordingly, further review of petitioner's case is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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